

exactly the same network design as Vonage, it would be exempt from local regulation. It would be absurd if the Minnesota PUC could exercise *greater* regulatory authority over Vonage, which merely provides an application that can be accessed over a cable modem connection, than it can over the provider of the access service.

Accordingly, the Commission should preempt the Minnesota PUC Order, both because it would impair the Federal policy of encouraging unregulated development of information services, and because it would improperly interfere with Vonage's provision of jurisdictionally interstate information services.

III. MINNESOTA'S 911 REQUIREMENTS, AS APPLIED, WOULD INTERFERE WITH FEDERAL POLICIES

At the outset, Vonage acknowledges that the protection of public safety is a traditional responsibility of State governments, and that States have a legitimate role to play in establishing procedures for operation of emergency response centers, including the manner in which messages are routed to those centers. Nonetheless, this Commission has determined that, where interstate travel and interstate communications are involved, national concerns may sometimes justify preemption of State rules and regulations pertaining to emergency 911 services.⁴⁹ Consistent with these principles, Vonage requests that the Commission declare that specific, discrete aspects of Minnesota's 911 requirements are in conflict with national policies because they would inseparably affect Vonage's interstate operations, and effectively require Vonage to operate as a telecommunications carrier.

Vonage wishes to emphasize, again, that it is seeking only narrow and limited preemption, and in particular is not seeking to prevent States from protecting public safety through reasonable and feasible 911 requirements. Except for the specific requirements identified in this section, Vonage is fully prepared to cooperate with Minnesota's emergency service authorities in achieving the mutual goal of protecting the safety of Vonage's customers. Vonage only seeks

⁴⁹ *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd. 18676 (1996).

preemption of specific aspects of Minnesota's regulations that are technically impossible to meet and otherwise inconsistent with Vonage's status as an information service provider. Vonage notes that the FCC is directly considering the issue of what, if any, 911 obligations are appropriate for VoIP providers, and acknowledges that a ruling in this proceeding would be subject to any future rules the Commission may adopt.⁵⁰

Under the rules of the Minnesota PUC, a prospective competitive LEC cannot be granted a certificate of authority until the PUC has approved a 911 plan that is "comparable to the provision of 911 service by the local exchange carrier (LEC) operating in the competitive local exchange carrier's service area." Minn. R. 7812.0550 subp. 1. For the reasons explained in Section I.B above, Vonage's 911 service technically cannot be made comparable to the services offered by traditional wireline LECs. If the Commission preempts Minnesota's certificate requirement as requested in preceding sections, this issue will be moot; but, if not, the Commission should nonetheless preempt the requirement that Vonage's 911 service be "comparable" to incumbent LEC service. Enforcement of this state requirement would effectively make it impossible for Vonage to provide interstate services to customers who travel, because of the requirement to provide a fixed service location for each customer.

Further, Vonage is unable to provide "comparable" service without the ability to interconnect to incumbent LEC E911 trunks. As this Commission is already aware from its efforts to promote wireless 911 access, the incumbent LEC networks serve as a significant obstacle to the integration of new technologies with the existing 911 network. The Commission's former Chief Technologist recently reported that:

the existing wireline E911 infrastructure, while generally reliable, is seriously antiquated. [This] infrastructure is built upon not only an outdated technology, but one that was originally designed for an entirely different purpose. It is an analog technology in an overwhelmingly digital world. Yet it is a critical building block in the implementation of wireless E911.

⁵⁰ See note 7, above.

From a national policy perspective, this latter observation is troubling for a number of reasons. ... [T]hese limitations not only burden the development of wireless E911 services, but they will also constrain our ability to extend E911 access to a rapidly growing number of non-traditional devices (e.g., PDAs), systems (e.g., telematics) and networks (e.g., voice networks that employ Voice-over-the-Internet Protocol -- VoIP).⁵¹

The same report also stated that:

The incumbent Local Exchange Carriers play a vital role in the provision of wireless E911 services to the PSAPs. The ILECs essentially stand between the wireless carrier and the PSAP. As the dominant providers of wireline E911 systems in the U.S., they directly or indirectly control the Selective Routers, ALI data bases, trunks, and other facilities necessary to deliver the wireless emergency call and associated callback number and location information to the appropriate PSAP.⁵²

These observations apply with equal force to the problem of integrating VoIP providers into the 911 network. Clearly, this is a national issue that should be addressed in a consistent manner nationwide.

In addition, the Department of Commerce Complaint demonstrates clearly that it would be a futile effort for Vonage to attempt to obtain approval of its 911 service without fundamentally changing the way its network operates. For example, in an affidavit filed with the Complaint, the State 911 Product Manager of the State Department of Administration, which is responsible for administration of the State's 911 service, stated as follows:

[Vonage] calls could be sent to administration lines which are not answered by trained dispatchers or may be answered after hours by a recording which, ironically, may contain instructions to hang up and dial 911 if the caller has an emergency to report. Had Vonage submitted this plan as a 911 plan to the Commission, I would have clearly filed comments recommending rejection of the plan.⁵³

⁵¹ Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced E911 Services*, WT Docket No. 02-46, Public Notice, DA 02-2666 (released Oct. 16, 2002) at 11 (underlining in original).

⁵² *Id.* at 32.

⁵³ Affidavit of Jim Beutelspacher, Ex. 9 to Complaint, at 5. Mr. Beutelspacher's statement appears to fly in the face of the information posted on his own Department's website, which lists a "24 hour" telephone number for every PSAP in Minnesota. See *Minnesota 9-1-1 Public Safety Answering Points*,

Similarly, the Executive Director of the board that administers the Minneapolis-St. Paul area 911 system testified that any 911 plan that did not provide the precise location of the calling party would be unacceptable:

The Vonage solution places their customers in a precarious and vulnerable position in that it places a burden and liability on the customer to register their location, if they know it, in order to provide 911 with the accurate location information in advance of a call. The customer has no way of knowing the correct location information to enter, no way of verifying the location information. There is no way for the 911 system to know if it is a correct location, and no way to prevent false or misleading location information.⁵⁴

Again, compliance with the demands of these Minnesota agencies would make it impossible for Vonage to offer interstate services to customers who travel, and therefore the effects of these State requirements necessarily conflict with Federal policies. The Commission should preempt the State of Minnesota's 911 requirements to the extent that they would compel Vonage (a) to provide 911 service that is "comparable" to incumbent LEC service, (b) to route emergency calls only to incumbent local exchange carrier 911 trunks, or (c) to identify a permanent location for every Vonage customer using the service in Minnesota.

IV. AS WITH THE INTERNET ITSELF, IT IS IMPOSSIBLE TO SEPARATE VONAGE'S SERVICE INTO INTERSTATE AND INTRASTATE COMPONENTS, SO THAT STATE REGULATION INHERENTLY CONFLICTS WITH FEDERAL LAW

Even if the Commission were to conclude that it currently lacked sufficient information to determine that Vonage is offering an information service (and not a telecommunications service), it could still grant this Petition on narrower grounds. Specifically, preemption is appropriate here because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components. This ground for preemption exists *regardless*

<http://www.911.state.mn.us/PDF/911MNPUBLICSafetyAnsweringPoints.pdf> (last updated Aug. 25, 2003) (visited Sept. 15, 2003).

⁵⁴ Affidavit of Nancy Pollack, Ex. 8 to Complaint, at 5.

of whether Vonage's service is considered an information service or a telecommunications service under Federal law, so the Commission need not resolve that question at this time.⁵⁵

Because of the nature of the Internet, it is technically impossible to apply Minnesota's regulations, purportedly limited to intrastate "calls," without also affecting interstate components of Vonage's service. Indeed, by its very nature, the Internet is interstate if not international in scope.⁵⁶ On traditional telephone networks, it is usually possible to determine the jurisdiction of traffic on a call-by-call basis, because the carrier (or, in the case of a reseller, the underlying facilities-based carrier) provides a physical connection to the end user, and therefore can determine where that user is located. On mobile wireless networks, determining jurisdiction is somewhat more difficult, but since the wireless carrier can track which cell site antenna is serving the customer's mobile unit, it can generally determine at least a reasonable approximation of the customer's location.

The Internet is different. It has been said that, "[o]n the Internet, nobody knows you're a dog,"⁵⁷ but it is also true that on the Internet, nobody knows where you are. The Internet has no system for determining the geographic location of users. As a result, Vonage has no way of accurately determining where a particular customer is located when the customer uses the service. Vonage identifies the digital signal processor in the customer's computer used to transmit and receive packets (so that it can verify that the user is indeed a customer), but since customers can easily plug devices such as the MTA computer into any Ethernet port connected to a broadband Internet connection, Vonage does not know where the device and its user are located

⁵⁵ Indeed, if Vonage's service were considered a telecommunications service, the Minnesota PUC Order would be subject to preemption under 47 USC § 253(a), because it would effectively prevent Vonage from offering both interstate and intrastate services to Minnesota users. It would be practically impossible for Vonage to comply with Minnesota rules governing "telephone companies" without fundamentally changing the nature of its service. However, Vonage has no intention to offer a telecommunications service and therefore does not submit this Petition under Section 253.

⁵⁶ 47 U.S.C. § 230(f)(1) defines the "Internet" as the "international computer network of both Federal and non-Federal interoperable packet switched data networks."

⁵⁷ P. Steiner, cartoon, *The New Yorker*, vol. 69, no. 20, page 61 (July 5, 1993).

at any given time. Therefore, it is technically impossible for Vonage to accurately determine whether a particular transmission is intrastate or interstate in nature.

As explained in Section III above, because Vonage cannot comply with Minnesota 911 requirements, Vonage cannot satisfy the Minnesota PUC Order and will be forced to discontinue “intrastate” service in Minnesota if the order becomes effective. However, because the Internet-based nature of its service makes it impossible to distinguish intrastate from interstate communications, the Minnesota PUC cannot enforce its Order with respect to Vonage’s intrastate services without also interfering with Vonage’s ability to provide at least some jurisdictionally interstate services over interstate communications facilities. Significantly, there is no “proxy” or “rule of thumb” the Minnesota PUC could apply that could reliably separate intrastate from interstate transmissions traveling over the public Internet and completed over Vonage’s service. For example, Vonage could not comply with the PUC Order by blocking all “calls” originating from and terminating to telephone numbers with Minnesota area codes, because some such numbers may actually being used by customers located in other states; and, conversely, some Vonage customers located in Minnesota are using non-Minnesota telephone numbers. Similarly, Vonage could not comply with the PUC order by preventing its customers with Minnesota mailing addresses from communicating with users of Minnesota telephone numbers, because the Vonage customer might not actually be in Minnesota at the time of using the service; and, conversely, this would not prevent customers from other states from using the service while visiting Minnesota.⁵⁸ Thus, Vonage has no way of assuring that it is in compliance with the Order unless it blocks a substantial amount of interstate traffic as well.

It is clear that this Commission has power to preempt State actions that would affect interstate communications: “questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to *interstate* communications service are to be governed solely

⁵⁸ As noted above, Vonage currently has 38 customers with Minnesota billing addresses who (at their request) are associated with non-Minnesota telephone numbers, and 88 customers with non-Minnesota billing addresses who are associated with Minnesota telephone numbers.

by federal law and ... the states are precluded from acting in this area.”⁵⁹ For example, if Minnesota were permitted to require Vonage to file tariffs, the company would be forced to apply those tariffs to at least some interstate traffic due to the impossibility of identifying call jurisdiction. That would conflict with the Commission’s *detariffing policy for interexchange services*.⁶⁰ Similarly, Vonage would be unable accurately to ascertain its liability for fees, taxes, and other charges applicable to intrastate telephone services, or (if it were considered a telecommunications carrier) for regulatory fees administered by this Commission and assessed on interstate revenues.

This Commission has previously confronted similar issues, and has not hesitated to preempt State regulation where, as a practical matter, it is impossible to separate a jurisdictionally mixed service into interstate and intrastate components.⁶¹ For example, the Commission has asserted jurisdiction over dedicated private lines carrying jurisdictionally mixed traffic (except where the interstate use is *de minimis*), because of the practical impossibility of measuring and billing separately for the portion of the line carrying intrastate traffic.⁶² Similarly, when the Commission granted GTE’s request to tariff the DSL Internet transport service sold to ISPs such

⁵⁹ *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir.1968) (emphasis added). See also *National Ass’n of Regulatory Util. Comm’rs v. FCC*, *supra* (affirming rules precluding states from regulating WATS service because “interstate communications .. are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communications Act”).

⁶⁰ *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996), Report and Order, 11 FCC Rcd 9564 (1996); Second Report and Order, 11 FCC Rcd 20,730 (1996), Order on Reconsideration, 12 FCC Rcd 15,014 (1997); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); Order, DA-002586 (Chief, CCB), rel. Nov. 17, 2000.

⁶¹ See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd. 22983, ¶ 107 (2000) (“[b]ecause fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission’s authority”); *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 10 FCC Rcd. 11700, ¶¶ 85-86 (1995) (California default line-blocking policy was preempted because it would preclude transmission of Caller ID numbers on interstate calls, and effect of the policy was inseverable).

⁶² *MTS and WATS Market Structure*, 4 FCC Rcd. 5660, 5660-61, ¶¶ 6-9 & n.7 (1989); see also *Petition of New York Telephone Company*, 5 FCC Rcd. 1080 (1990).

as AOL, the Commission found that Internet access is interstate telecommunications.⁶³ The Commission acknowledged that some of the transmissions passing over an Internet access line may be intrastate in nature, but that the interstate component was not *de minimis*.⁶⁴

The same inseverability doctrine justifies preemption here. Because Vonage cannot comply with the 911 requirements, the Minnesota PUC Order effectively requires Vonage to cease completing intrastate "calls" in Minnesota. Vonage has demonstrated that it is impossible to do this without also blocking a significant amount of interstate traffic. Indeed, since *any* Vonage customer could, in theory, travel to Minnesota at any time and connect their MTA computer to a broadband Internet connection, Vonage could never prevent *all* intrastate Minnesota use of its service unless it blocked *all* interstate "calls" as well. The Commission can and should preempt Minnesota to the extent necessary to prevent this impact on the Internet and interstate services.

V. CONCLUSION

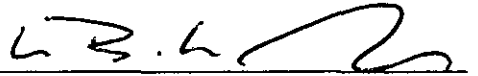
Vonage requests that the Commission issue a Declaratory Ruling finding that the State of Minnesota is preempted from regulating Vonage as an intrastate telephone company because Vonage is a provider of information services (and not a telecommunications carrier or a common carrier subject to Title II of the Communications Act of 1934) and State regulation of these services unavoidably would conflict with the national policy of promoting unregulated competition in the Internet and information services market, as recognized in 47 USC § 230(b)(2). The Commission should also find that certain specific E911 requirements imposed by the Minnesota PUC, as described in Section III above, are in conflict with Federal policies. In the alternative, the Commission should declare that Minnesota's regulation of Vonage's service is preempted

⁶³ See *GTE Tel Operating Cos. GTOC Transmittal No. 1148*, 13 FCC Rcd. 22466 (1998) ("GTE DSL Order").

⁶⁴ *GTE DSL Order*, ¶¶ 22, 25.

because it is inherently impossible to separate any service offered over the public Internet (regardless of its regulatory classification) into distinct interstate and intrastate components.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W.B. Wilhelm", written over a horizontal line.

William B. Wilhelm

Russell M. Blau

Tamar E. Finn

Swidler Berlin Shereff Friedman, LLP

3000 K Street, N.W., Suite 300

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Exhibit 1

John C. Dvorak
“Free Phone Calls”
PC Magazine – August 19, 2003

John C. Dvorak

Free Phone Calls

Recently, I packed up my little Cisco ATA 186 Analog Telephone Adapter, along with a compact D-Link DI-604 Ethernet Broadband Router, and checked in to my favorite small hotel in New York City: the Park South on 28th Street. This new boutique gem is located a few steps from a subway entrance and one block from *PC Magazine's* offices; it loans DVDs, has fabulous pillows, and has free T1 connections in the rooms.

It was this last amenity that got my attention when I first discovered the place. I decided to try to use the T1 line to make phone calls. I have Vonage VoIP phone service, which comes with a real phone number and links into telco networks via a broadband connection and the ATA 186.

When I arrived at the Park South Hotel, I plugged the D-Link hub into the RJ-45 jack and then plugged the ATA 186 into the hub. I plugged the hotel phone into the ATA 186, I was prepared to buy a small phone if I had to, but the hotel phone worked fine for this experiment.

I lifted the hook expecting to hear a normal dial tone. When you're using Vonage, you get a dial tone and would never know you were not using POTS. In this case, I got no dial tone. But when I plugged the laptop into the hub and went online, I tried again, and voila! A dial tone.

I made a few calls. Perfect. In fact, the line was cleaner than the one I have at home. I could make unlimited calls from the hotel room. And I could receive calls as though I were at home.

Anyone who would use Vonage in a hotel has long since stopped using the hotel phone anyway. Most people use mobile phones when they travel. Even with the priciest roaming charges, mobile calling is cheaper than the horrid hotel phone rates. Only dummies use hotel phones.

I wonder what the Park South folks would think if they knew people could completely bypass the hotel's phone for all calls. I'm certain that both telco executives and hoteliers are going to be passing this column around with notes of concern scribbled in the margin. But smart hotel operators will see this as an opportunity. I'm a regular at the Park South because of the T1 connection. What's more important than a regular customer?

I suppose that a basic cell-phone plan would be cheaper than my Vonage lash-up. But I still prefer a land line—and this is it. The Vonage IP phone is just the beginning of a revolution in what the telcos call bypass. Within minutes of connecting, I got calls that were initially placed to my home phone and were routed to the Vonage phone. Here's where it gets interesting.

I have a summer house in Washington, and I like to forward my California number to the Washington number when I'm up there. This entails a long-distance charge each time a call is rerouted. But if I were to forward the call to my Vonage number (which is local), then forward the Vonage number to the Washington number, I'd pay no long-distance charges. The routing possibilities are endless.

Since I can take the ATA 186 and D-Link hub anywhere in the world, I can even go back to the Grand Hotel Union in Ljubljana, Slovenia, where I had a free T1 line in my room. There I could hook up and make calls to the U.S. from Europe at no charge. And I could receive calls as if I were at home in California. I have a friend in Paris who does this sort of thing already.

This is the future of telephony, although the telcos would prefer that nothing change. If they would simply bite the bullet and sell people connectivity to the network at a reasonable fee, they could collect money without having to deal with the idiosyncrasies and agonies of the voice call business. They could sell IP phones, too. I see no reason for Cisco not to make an IP phone with the ATA 186 built into a small handset that people could take anywhere, or to make a combo cell phone with this feature. Instead of an RJ-11 connection, it would have an RJ-45 connection.

The next phase of the experiment will be to see how such systems work over makeshift 802.11 wireless networks. What remains to be seen is whether the Web can absorb a lot of voice traffic, if this kind of system becomes popular. And I wonder what dirty tricks the telcos have up their sleeves to thwart such progress.

MORE ON THE WEB: Read John C. Dvorak's column every Monday at www.pcmag.com/dvorak. You can reach him directly at pcmag@dvorak.org.

I can hook up to a T1 line and make calls to the U.S. from Europe at no charge.

Exhibit 2

Minnesota Department of Commerce Complaint

PUBLIC VERSION



85 7th Place East Suite 500
St. Paul, Minnesota 55101-2198
651.296 4026 FAX 651.297.1959 TTY 651.297.3067

July 15, 2003

**PUBLIC DOCUMENT – TRADE SECRET
DATA HAS BEEN EXCISED**

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East Suite 350
St Paul Minnesota 55101-2147


Re: **Complaint of the Minnesota Department of Commerce**
Docket No. P6214/C-03-108

Dear Dr. Haar:

Attached is the Complaint of the Minnesota Department of Commerce in the following matter:

**Complaint of the Minnesota Department of Commerce against Vonage Holdings
Corporation**

Sincerely,


MICHELLE REBHOLZ
Rates Analyst

MR/sm
Attachment

PUBLIC DOCUMENT -- TRADE SECRET DATA HAS BEEN EXCISED

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
SUTTE 350
121 SEVENTH PLACE EAST
ST. PAUL, MINNESOTA 55101-2147**

**LeRoy Koppendrayer
Gregory Scott
Marshall Johnson
Phyllis A. Reha**

**Chair
Commissioner
Commissioner
Commissioner**

**COMPLAINT OF THE MINNESOTA
DEPARTMENT OF COMMERCE**

REQUEST FOR TEMPORARY RELIEF

REQUEST FOR AN EXPEDITED PROCEEDING

In the Matter of The Complaint of the)
Minnesota Department of Commerce)
Against Vonage Holding Corp)

Docket No. P6214/C-03-108

Regarding Lack of Authority to)
Operate in Minnesota)
)

INTRODUCTION

This is a Complaint and Request for Temporary Relief brought by the Minnesota Department of Commerce ("Department") against Vonage Holding Corporation ("Vonage"). This Complaint, in summary, maintains that Vonage has offered and continues to furnish telephone services in Minnesota, including local exchange service and long distance service, without first obtaining a certificate under Minn. Stats. §§ 237.16 and 237.74, for those services. The Department further alleges that the manner in which Vonage provides local service violates Minnesota law in that it fails to provide adequate 911 service. Additionally, Vonage did not file a tariff containing all terms and conditions regarding its services.

In support of this Complaint, the Department alleges:

PARTIES

1. The Department's local address in Minnesota is Golden Rule Building, 85 East 7th Place, Suite 500, St. Paul, MN 55101-2198. The Department is represented in this proceeding by its attorney:

Steven H. Alpert
Assistant Attorney General
525 Park Street, Suite 200
St. Paul, Minnesota 55103-2106
(651) 296-3258 (telephone)

2. Respondent Vonage is a corporation with its principal place of business at 2147 Route 27, Edison, NJ 08817. The Department believes that Vonage is represented by its attorney:

Russell M. Blau
Swidler Berlin Shereff Friedman, LLP
3000 K Street NW, Suite 300
Washington, DC 20007-5116
(202) 424-7835 (telephone)

JURISDICTION

3. Under Minn. Stat. § 216A.07, the Department is charged with investigating and enforcing Chapter 237 and Commission orders made pursuant to that chapter. The Department's investigation into uncertificated local and long distance services, described more particularly below, establishes that Vonage's behavior violates state law.

4. The Minnesota Public Utilities Commission ("Commission") has authority under Minn. Stat. § 237.081 to investigate each of the Department's claims that Vonage is unlawfully providing telephone service and to order further proceedings under Minn. Stat. § 237.461 (enforcement) and § 237.462 (competitive enforcement; administrative penalty orders). Further, the Commission has specific authority under Minn. Stat. § 237.462, subd. 7 to grant the Department's request for temporary relief pending dispute resolution, and under § 237.462, subd. 6 to grant the request for an expedited proceeding.

FACTUAL BACKGROUND

THE OFFERING OF LOCAL AND LONG DISTANCE SERVICE

5. On December 23, 2002, the Department was alerted to a company that was advertising the offering of local and long distance service to Minnesota consumers. The company in question, Vonage, stated on its website that "Vonage Digital Voice is an all-inclusive home phone service that replaces your current phone company." (Exhibit 1) As also

listed on Exhibit 1, Vonage characterizes itself as "The BROADBAND Phone Company." The website confirmed that Vonage Digital Voice was being offered in parts of Minnesota. (Exhibit 2)

6. Vonage's website advertised other features typically offered with traditional local wireline telecommunications service, including local number portability. The website also offered end users the ability to choose a telephone number. (Exhibit 2)

7. On January 3, 2003, the Department sent a letter to Vonage, inquiring about Vonage's offering of local and long distance telephone service in Minnesota. The Department also noted that to offer telephone service in the state, Vonage would be required to apply for a certificate of authority with the Commission and comply with all applicable legal requirements, including the provision of 911 service. (Exhibit 3)

8. On January 21, 2003, Vonage, through its counsel, replied to the Department's letter. Vonage stated that it was a provider of "information services," not "telecommunications services," and therefore was exempt from any requirements on telecommunications providers in the state. The company explained that it offered service using Voice Over Internet Protocol, or VOIP. Vonage further replied that while it planned to develop an "Internet-based" 911 service in the future, it was not bound by state requirements concerning 911. (Exhibit 4).

9. In January 2003, the Department spoke with a Minnesota Vonage customer, who listed the telephone number Vonage provided him. The telephone number in question, according to the North American Numbering Plan Administrator's (NANPA) records, had been assigned to Focal Communications Corporation. In response to Information Requests issued by the Department, [TRADE SECRET DATA HAS BEEN EXCISED] The Federal Communications Commission only allows certificated telecommunications carriers, who present proof of their certification, to receive telephone numbers from NANPA. See 47 C.F.R. § 52.15(g)(2).

10. A presentation made by Vonage to the North American Numbering Council (NANC) in January 2003 explains the call flow when a phone call is made from or to a Vonage customer. (See Exhibit 5) As illustrated in Exhibit 5, during a call between a Vonage customer and a non-Vonage customer, the call travels over the Public Switched Telephone Network (PSTN). The full presentation, as of July 3, 2003, is available at www.nanc-chair.org/docs/nowg/Jan03_Vonage_Presentation.pdf.

11. In response to Department Information Requests (IR), Vonage explained that for a call made by a Vonage end user [TRADE SECRET DATA HAS BEEN EXCISED]

THE OFFERING OF A TELECOMMUNICATIONS SERVICE

12. The Federal Communications Commission ("FCC") outlined the following factors to examine in determining whether IP telephony is a telecommunications service: 1) the provider holds itself out as providing voice telephony service; 2) the service allows use of Customer Premises Equipment (CPE) similar to that CPE necessary to place an ordinary touch-tone call over the public switched telephone network; 3) the service allows the customer to call

telephone numbers assigned in accordance with the North American Numbering Plan (NANP); 4) the service transmits customer information without net change in form or content. See *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 (1998) ("Report to Congress")

13. In stating that it was exempt from state certification and 911 requirements, Vonage claimed that its IP telephony service was an information service under 47 U.S.C. § 153(20). That statute states: "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..."

14. In its Report to Congress, the FCC discounted the argument that voice communications using IP telephony, of the type utilized by Vonage, fell under the definition of information services:

Specifically, when an IP telephony provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network.

*** From a functional standpoint, the users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them 'information services' under the statute, and instead bear the characteristics of telecommunications services.

Report to Congress, ¶89.

15. In its current representations to customers, Vonage markets its Digital Voice service as a telecommunications service. At www.vonage.com/learn_tour.php, it characterizes its service as a "phone service." (Exhibit 1)

16. A review of the Vonage website finds no mention of the Vonage Digital Voice service as an "information service," nor any mention that its service is not in compliance with state 911 or consumer protection-related requirements. In fact, Vonage represents that its service "is like the home phone service that you have today—only better!" and "replaces your current phone company." See www.vonage.com/learn_tour.php. (Exhibit 1)

17. At http://www.vonage.com/corporate/releases/pr_06_10_03.php, Vonage characterizes itself as "the fastest growing telephony company in the US, Vonage's service area encompasses more than 1,000 active rate centers in 77 US markets." The webpage also states that Vonage currently has over 25,000 lines in service. (Exhibit 6)

18. At www.nanc-chair.org/docs/nowg/Jan03_Vonage_Presentation.pdf, (Exhibit 5) Vonage states that its service works with any touch-tone telephone. A touch-tone telephone is considered standard CPE for telephone service.

19. Vonage's service allows its end users to call telephone numbers assigned in accordance with the NANP.

20. The FCC has stated that phone-to-phone IP telephony transmits customer information without a net change in form or content. See Report to Congress, fn 188.

21. Since the 1998 Report to Congress, the FCC has reiterated that the underlying technology used to deliver a service is not the determining factor when deciding whether to categorize a service as a telecommunications service:

We believe the statute and our precedent suggest a functional approach, focusing on the nature of the service provided to customers, rather than one that focuses on the technical attributes of the underlying architecture.

CC Docket Nos. 02-33, 95-20, 98-10, rel. February 15, 2002, para. 7.

22. Based upon the multiple representations made on Vonage's website, information provided by Vonage regarding its Digital Voice Service, information provided by current Vonage end users regarding Vonage's Digital Voice Service, Vonage's use of standard CPE to provide telephone service, the ability of Vonage users to call telephone numbers assigned in accordance with the NANP, and the transmission of information without a net change in form or content, Vonage's Digital Voice Service offers real-time, two-way wireline voice communications comparable to local and long distance telecommunications service offered by certificated carriers; Vonage provides and/or offers to provide telephone services in Minnesota.

23. Vonage continues to provide and/or offer telephone services in Minnesota without proper certification.

24. The New York Public Service Commission, using the criteria identified by the FCC identified in its Report to Congress, has found that a long distance VOIP provider is in fact a telecommunications carrier. Order Requiring Payment of Intrastate Carrier Access Charges, Case 01-C-1119 (May 31, 2002). The Washington Utilities and Transportation Commission and the Ohio Public Utilities Commission have also opened dockets to address VOIP. See Docket Nos. UT-030694 and 03-950-TP-COI, respectively.

FAILURE TO PROVIDE ADEQUATE 911 SERVICES

25. As of the date of the Complaint, Vonage's website currently states at www.vonage.com/features_911.php, "Vonage is proud to offer 911 emergency dialing."

However, the website further states that 911 service will not work during a power outage and requires the customer to activate 911 dialing before calls to 911 will work. (Exhibit 7)

26. Vonage has never submitted a 911 plan to the Minnesota Metropolitan 911 Board, the Minnesota Department of Administration, the Department, or the Commission, to determine whether Vonage's advertised 911 service complies with applicable state 911 requirements, including, but not limited to, Minnesota Rules Chapter 1215 (Emergency 911 Systems). (Exhibit 8, Affidavit of Nancy Pollock, Metropolitan 911 Board, page 3; Exhibit 9, Affidavit of Jim Beutelspacher, Minnesota Department of Administration, page 4.)

27. Vonage's website further states that 911 calls will be routed to a different phone number than traditional 911 calls answered at Public Safety Answering Points (PSAP), but is not specific on where exactly where emergency calls will be routed. See http://www.vonage.com/features_911.php. (Exhibit 7)

28. Minnesota 911 standards prohibit the routing of emergency calls by alternate means other than the native 911 network, except in very limited circumstances and only with the permission of the 911 Board and other public safety agencies. Exhibit 8. Vonage has never consulted with the 911 Board, Administration, the Department, or the Commission to determine whether Minnesota 911 requirements allow calls to be routed to the numbers determined by Vonage. (Exhibit 8, page 4; Exhibit 9, page 5)

29. To the best of the Department's knowledge, Vonage has never consulted with the Minnesota PSAP locations to determine whether the PSAPs agree to the routing of 911 calls to these locations, nor to determine whether Vonage's call routing poses a public safety risk. Any arrangements Vonage made to route 911 calls to administrative numbers at Minnesota PSAPs were done without the prior consent and knowledge of the 911 Board, Administration, Department, and Commission. (Exhibit 8, page 4)

30. Administrative PSAP numbers of the type Vonage is routing 911 calls to are not equipped to answer 911 emergency calls. (Exhibit 8, page 4; Exhibit 9, page 5) Administrative PSAP numbers do not have the ability to receive ANI/ALI information, which automatically displays the number the caller is calling from, as well as the address which they are calling from, in the event that the caller is unable to speak. (Exhibit 8, pages 4-5) In addition, since administrative numbers are not equipped to handle emergency calls, they are not answered on a priority basis, may not be staffed 24 hours a day, and/or the recipient of the call may not be equipped or trained to summon emergency services to the caller. Id.

31. The Department has contacted certificated telecommunications carriers offering VOIP to inquire whether those carriers have been able to comply with state 911 requirements. Those carriers have indicated that they have provided 911 service in compliance with 911 requirements. The 911 plans of the carriers contacted have been reviewed by the 911 Board and approved by the Commission.

32. Vonage has also not deposited any 911 fees to the State of Minnesota. 911 fees are required to be collected from customers and forwarded to the State of Minnesota to fund the statewide 911 systems. (Exhibit 9, page 4.)

TARIFFS AND VIOLATION OF OTHER STATUTES/RULES

33. Vonage has not filed any tariffs with the Commission or the Department listing the pricing or terms and conditions for its telephone service provided in Minnesota.

34. At http://www.vonage.com/features_terms_service.php, Vonage lists terms and conditions of service that would be disallowed of a certificated telecommunications carrier. For example, Vonage "reserves the right to terminate Service at Vonage's discretion," may discontinue the service for "any reason" and may terminate a customer's account "at any time." The company also requires its end users to pay "all charges posted to [his/her] account, including "disputed amounts," by the date shown on the invoice. Vonage also disclaims responsibility for any lack of privacy which the customer experiences with regard to using the service. (Exhibit 10) These terms and conditions do not comply with various Commission Rules, including Minnesota Rules parts 7810.1800, 7810.1900, 7810.2000, 7810.2100, 7810.2400, and 7810.2500.

INFORMAL EFFORTS AT RESOLUTION

35. The Department has attempted to resolve the certification concerns with Vonage informally, beginning with its December 23, 2002 letter to Vonage. Vonage has declined efforts to resolve this matter informally, by refusing to comply with state certification requirements. Administration and the 911 Board have attempted to resolve violations of 911 standards informally, which Vonage has also refused to comply with. Vonage additionally has implemented a 911 "plan," advertised on its website, which it has implemented without first contacting any regulatory agency to determine whether its actions pose a risk to public health and safety. While Vonage initially complied with Department IRs, Vonage has now refused to produce information requested in Department IRs, eliminating the possibility of the Department, Administration, and 911 Board to gather additional information in an attempt to reach a workable solution to Vonage's service offering.

COUNT I: FAILURE TO OBTAIN CERTIFICATE OF AUTHORITY

36. Minnesota Statutes § 237.16, subd. 1(b) states that:

"No person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service,

the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules."

37. Minnesota Statutes § 237.74, subd. 12 states in part:

Certification requirement. No telecommunications carrier shall construct or operate any line, plant, or system, or any extension of it, or acquire ownership or control of it, either directly or indirectly, without first obtaining from the commission a determination that the present or future public convenience and necessity require or will require the construction, operation, or acquisition, and a new certificate of territorial authority.

38. Minnesota Rules 7812.0200, subp. 1 provides:

"No person may provide telecommunications service in areas served by local exchange carriers with 50,000 or more subscribers in Minnesota without first obtaining a certificate under this part and parts 7812.0300 to 7812.0600..."

39. Vonage has not obtained a certificate of authority from the Commission. Vonage is providing telecommunications service in areas served by local exchange carriers with 50,000 or more subscribers in Minnesota, but it has not first obtained a certificate under Minn. Rule 7812.0200, subp. 1, or under parts 7812.0300 to 7812.0600. Respondent Vonage has been operating in Minnesota without authority since December 16, 2002, and is currently providing local exchange service to at least 100 customers.

40. The Commission has previously granted certificates of authority based upon the nature of the service being provided to customers, rather than the technology of the underlying facilities used to provide that service, in accordance with the FCC's approach. For example, in Docket No. P5981/NA-00-1530, Order Issued January 17, 2001, the Commission granted a certificate of authority to a carrier who indicated it provides telephone service through its cable facilities.

41. Vonage has violated Minnesota Statute § 237.16, subd. 1(b), Minnesota Statute § 237.74, subd. 12 and Minnesota Rule 7812.0200, subp. 1.

COUNT II: FAILURE TO COMPLY WITH 911 REQUIREMENTS

42. Minnesota Rules part 7812.0550 subpt 1 states in part:

"Before providing local service in a service area, a competitive local exchange carrier (CLEC) shall submit to the commission a comprehensive plan, detailing how it will provide 911 service to its customers in a manner consistent with applicable law, including

chapter 1215, and comparable to the provision of 911 service by the local exchange carrier (LEC) operating in the competitive local exchange carrier's service area....The commission shall not permit the CLEC to begin providing local service until the commission has approved the plan."

43. Although required to do so, Vonage has not submitted a comprehensive plan to the Commission detailing how it will provide 911 service to its customers in a manner consistent with applicable law.

44. Vonage has violated Minnesota Rules part 7812.0550 subpt. 1.

COUNT III: FAILURE TO PAY 911 FEES

Minnesota Statutes § 237.49 states in part:

Each local telephone company shall collect from each subscriber an amount per telephone access line representing the total of the surcharges required under sections 237.52, 237.70, and 403.11. Amounts collected must be remitted to the department of administration in the manner prescribed in section 403.11.

45. Vonage has not remitted any 911 fees to the Department of Administration.

46. Vonage has violated Minnesota Statutes § 237.49.

COUNT IV: FAILURE TO FILE TARIFF

47. Minnesota Statutes § 237.07 states in part:

Every telephone company shall elect and keep on file with the department a specific rate, toll, or charge for every kind of noncompetitive service and a price list for every kind of service subject to emerging competition, together with all rules and classification used by it in the conduct of the telephone business...

48. Although required to do so, Vonage has not kept on file with the Department any Commission-approved specific rate, toll, charge or price list for any service, nor any rules or classifications used by it in the conduct of the telephone business.

49. Vonage has violated Minnesota Statutes § 237.07.

REQUEST FOR TEMPORARY RELIEF

50. Minn. Stat. § 237.462, subd. 7 provides for temporary relief pending a resolution of a dispute. Temporary relief is appropriate, after notice and an opportunity for comment, if the Commission finds that a verified factual showing has been made that the party seeking relief will likely succeed on the merits, the order is necessary to protect the public's interest in fair and reasonable competition, and the relief sought is technically feasible.

51. Based on the facts as pleaded, the Department is likely to succeed on the merits. Vonage is required to comply with the Minnesota Statutes and Rules referenced above in Count 1 and Count 2. Vonage simply has not complied despite informal efforts at resolution. As listed above, the Department initially contacted Vonage in December 2002 regarding certification and 911 compliance. Vonage implemented a "911 plan" without consulting with or contacting the Department, 911 Board, or any other state regulatory agencies before implementing its purported 911 Plan, in a manner that poses a threat to the public safety of Minnesotans. While Vonage has responded to a number of IRs issued by the Department, Vonage has also stated that it is not required to respond to Department IRs, and has refused to respond to some IRs, including the Department's request to provide a copy of its agreement with its Gateway provider.

52. An order for temporary relief is necessary to protect the public's interest. Despite clear legal obligations to obtain a certificate of authority, to file and obtain approval from the Commission for a 911 plan, Vonage has taken none of these steps to comply with Minnesota law.

53. Without immediate relief, it is reasonable to assume that Vonage will continue to provide unauthorized service and will continue to represent that its service is a replacement to traditional telephone service. Consumers of Vonage are at risk in the event of an emergency since a 911 plan has never been approved.

54. The temporary relief sought herein, like the permanent relief requested, is technically feasible.

55. Accordingly, under Minn. Stat. § 237.462, subd. 7, the Department hereby requests that the Commission issue an order:

56. Prohibiting Vonage from pursuing marketing efforts on all potential Vonage customers until Vonage has applied for and received proper certification from the Commission. Further, that Vonage be required to immediately provide a copy of its contract with its Gateway provider;

57. Requiring Vonage to mail to its current Minnesota customers, a Commission-approved notice explaining that Vonage is not a certificated telephone company in the state of Minnesota and that Vonage's 911 service does not comply with state requirements. A proposed notice to Vonage end users is attached as Exhibit 11; and

58. Requiring Vonage, within 5 days of the date of the Commission's hearing in this docket, to contact the 911 Board and Department of Administration to submit a 911 plan for both agencies' review.

REQUEST FOR AN EXPEDITED PROCEEDING

59. The Department requests an expedited proceeding pursuant to Minn. Stat. § 237.462, subd. 6. An expedited proceeding is in the public interest. Vonage is currently operating without certification, in violation of 911 rules, and without proper tariffs. The safety concerns associated with the 911 issue alone underscores the need to resolve this matter promptly.

OTHER RELIEF REQUESTED

WHEREFORE, the Department further requests that the Commission:

60. Issue an Order finding that Vonage has knowingly and intentionally violated cited Minnesota Rules and Statutes;

61. Order Vonage to fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of the Commission's Order;

62. Order Vonage to remit 911 fees to the Minnesota Department of Administration for the period of time when it served Minnesota customers but did not pay such fees;

63. Assess penalties it deems appropriate under Minn. Stat. § 237.461 or .462.

64. Grant such other and further relief as the Commission may deem just and reasonable.

Dated:

Respectfully submitted,

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ATTORNEY FOR MINNESOTA
DEPARTMENT OF COMMERCE

COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Jan Mottaz, on the 14th day of July, 2003, served the attached MN Department of Commerce Complaint against Vonage Holdings Corporation.

DOCKET NUMBER: P6214/C-03-108

by depositing in the United States Mail at the City of St. Paul,
A true and correct copy thereof, properly enveloped with postage prepaid
 by personal service (MN PUC)
 by delivery service
 by express mail-UPS overnite
 by e-mail or fax

To all persons at the address indicated below :

Russell Blau
Swidler Berlin Shereff Friedman LLP
3000 K St NW, ste 300
Washington DC 20007-5116

John Rego
Vonage Holding Corp
2147 Route 27
Edison NJ 08817

Jon Mott

Docket No. P6214/C-03-108
Exhibit 1